

The Framing of the African Union in International Criminal Law: A Racialized Logic

The International Criminal Court (ICC) ['has been put in place only for African countries, only for poor countries...Every year that passes, I am proved right... Rwanda cannot be part of colonialism, slavery and imperialism'](#). These words by Rwandan President and newly elected chairperson of the African Union (AU), Paul Kagame, have become widespread within the AU in response to the Court's overwhelming investigations and prosecutions of Africans. Yet, many of the ICC's proponents have dismissed neocolonial criticism of the Court, to some extent with good reason. It is difficult not to read Kagame's statement and similar statements by AU representatives as self-serving in the context of ongoing human rights abuses and violence perpetrated against civilians. But another way to read or 'misread' these statements is by looking at the relationship between the ICC as an institution of international criminal law (ICL) and the legacies of colonialism. In this vein, I want to highlight a growing pattern, within ICL discourses, of framing the AU as the antithesis of the ideals articulated in the ICC project. Broadly informed by Third World Approaches to International Law (TWAIL), I want to call attention, in particular, to the racialized logic upon which this deeply structural framing device rests.

African Union criticisms of the ICC

It is not difficult to understand why the Court has run into a pan-African-led opposition. From its inception in July 2002 until January 2016, when the ICC opened investigations in Georgia – the first non-African situation after a period of almost 14 years – the Court and particularly the Office of the Prosecutor (OTP) prioritized resources relating to *investigations* (as opposed to preliminary examinations) solely in relation to armed conflicts in Africa. A notable feature in four of these investigations is that they were triggered by self-referrals. Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali chose to refer situations on their own territory to the Court. However, it is sometimes forgotten that self-referrals do not automatically result in the opening of an investigation. The OTP must actively decide whether there is a 'reasonable basis' to shift to an investigation of a situation or case based on Article 53 of the Rome Statute. Critics may retort that the ICC chief prosecutor, Fatou Bensouda, is herself from Gambia. To be sure, relations of power are not personal but structural.

ICL Responses to the African Union

The AU's main criticism of the Court as only or predominantly ['targeting'](#) Africans for prosecution has been described by some ICC proponents as ['exaggerated'](#), ['self-interested'](#), [defiant](#) and an act of [myth-making](#). Kenneth Roth, the Executive Director of Human Rights Watch, claims the criticisms constitute an ['attack'](#) on the Court. According to Roth, the ICC should be ['applauded for giving long-overdue attention to atrocities in Africa - a sign that finally someone is concerned about the countless ignored African victims'](#). Bensouda joins in on this narrative. Describing Africa as a place of ['brutal and unimaginable crimes'](#), she maintains that her role is to serve victims, in the process referring to the collective criticisms of the AU as a form of

['propaganda'](#) by a violently-driven political elite that seeks to manipulate and ['discredit'](#) the Court.

In contrast to this monolithic and binary framing of African leaders and victims, the ICC's proponents are depicted as a bulwark against Africa's violent rulers. Driven by brutal violence, the AU is pitted against the enlightened and progressive ideals of the ICC and the desires of victims. Victims, argue Sara Kendall and Sarah Nouwen, become a [rhetorical justification](#) for the ICC project. As Bensouda herself claims, the Court ['give\[s\] victims a voice', presumably because, within this narrative, they are rendered passive in the face of brutal leaders.](#)

An exception to this pessimistic framing of African states arises in the context of self-referrals where the prevailing story of African states swings from pessimism to optimism – a co-operating state recovers its humanity by conforming to the standards and progressive ideals of the ICC. For sure, the problem lies not with the anti-impunity ideals of the Court *per se* or the desire to secure accountability for 'victims', but with how these ideals become crucial tools by which a racial other is articulated within the discipline of ICL. This is made possible by the framing of individuals and groups of particular racial and cultural origin including, the AU, as a site of backward humanity. African states are lumped into two main categories; they are either champions or villains of ICL – a doubling that circumscribes our understanding of the multiplicity of reasons for their participation in the ICC within a narrow range of possibilities.

Let me illustrate my argument that a racialized pattern of framing the AU has become increasingly widespread within ICL, through a personal experience. Late last year I participated in the fifth Australian ICL workshop, hosted by Melbourne Law School. The [call for papers](#) included proposals on the potential and limits of the ICC in the 'current legal and political climate' including proposals on the 'ICC's "Africa problem"' and its relationship to the AU. The workshop theme engaged with the question of 'Where are we now? Looking Forward to the 20th Anniversary of the Rome Statute' and proceeded over two days. I gave a presentation on the role of epistemic difference in the construction of African political consciousness within ICL discourses.

Following my presentation, I was asked words to the effect of, but *why should we listen to the African Union or its member states?* It was not easy to answer right away. I had difficulty imagining anyone asking me why we should listen to, say, the European Union; such a question seems hardly thinkable in the context of Western states. Yet, it seems African states are not as equally deserving of the listening capacities of international lawyers and civil society activists. Why should they be heard with the same attentiveness as Western states, or at all? It may have been an innocent question, but even innocent questions take on particular meaning within certain contexts. It demonstrated to me how sudden a debate turns into a question of *who is deserving and undeserving of our attention*. Not only does it reflect the increasing normalization of a particular framing of the AU, but also how legal debate itself can become a vehicle for the reproduction of unequal relations of power.

The Dominant Framing of the AU: a Sign of an Anxiety-Driven Discipline

To make sense of all this, it is important to locate the increasingly racialized framing of the AU within the discipline's growing demands to secure and further the ICC project and broader ICL discipline - a discipline that has acquired rapid growth in a relatively short period. This desire manifests in a set of contradictions, ambivalences and anxieties. Nowhere is this more apparent than in widespread claims that the Court's very [legitimacy](#) and future survival is at stake. This fear was made real when in October 2017 Burundi became the first state to effectively withdraw from the Court, but it is so far the only state to do so, making claims of a potential mass ['exodus'](#) appear highly exaggerated. Nevertheless, the prevailing view is that the AU's critique represents an existential threat *for* the ICC and delegitimizes the ICL project. As a result, legal debates have been increasingly geared towards promoting the Court's existence and future with reference to representations of the AU as a politicized and violent other that then allows the ICC to be invoked as both normatively desirable and the normative standard for debate.

Implications for ICL

What is lost within this framing of the AU is an understanding of how a racialized logic is being increasingly articulated within ICL based on a binary framing that produces and normalizes a racialized other in opposition to the ideals of the ICC project. Apart from the intentions of international lawyers and civil society activists, this emerges as a result of the overdetermined way that criticism of the Court has been framed to enable ICL's normative promotion and to provide a key justification for the ICC's continuing existence.

On a practical note, this racialized framing places the ICC itself in a vulnerable position within Africa, not because the AU is necessarily 'pro-impunity' but because ICC discourses replicate the racialized logic of colonialism, stigmatizing the AU in order to affirm the ICC project. Meaningfully engaging with the AU's critique, as a starting point, would enable many proponents of the ICC to challenge rather than replicate unequal structures of power that leave the discipline blind to its imperial character. Certainly, this would allow international lawyers and activists to be more attentive to and take seriously the racialized logic that underpins and authorizes the authority upon which the ICC - and the broader project of ICL - rests.

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